NO. 2794

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

TOKU SAKAI,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT

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Upon Appeal from the United States District Court for the Territory of Hawaii.

United States Circuit Court of Appeals

NINTH CIRCUIT. DISTRICT OF CALIFORNIA

TOKU SAKAI,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

No. 2794

BRIEF OF APPELLANT

This is an appeal from the final decree of the United States District Court, for the Territory of Hawaii, made on March 4, 1916, discharging the writ of habeas corpus of Appellant, TOKU SAKAI, theretofore issued out of that court, and remanding Appellant to the custody of the respondent in that habeas corpus proceeding, the inspector in charge of the United States Immigration Station at the port of Honolulu. Appellant claims by proper exceptions and assignments of error that the said decree of the United States District Court for the Territory of Hawaii, should be reversed and Appellant dis-

charged from custody under her said writ of habeas corpus for the following reason:—

(1.)

APPELLANT WAS DENIED DUE PROCESS OF LAW IN THAT—

1. *She was given no hearing at all before the Immigration Authorities at the port of Honolulu, under the Constitution and Laws of the United States and the Immigration Rules.*
2. *She was given only the semblance of a hearing before the Immigration Authorities at the port of Honolulu, under said laws and rules.*

We will consider these propositions in their order:

1. *There was no hearing at all given Appellant and she was therefore denied due process of law.*

The deportation of Appellant is sought under the Act of Congress approved February 20, 1907, amended by the Act of Congress approved March 26, 1910. (34 Stat. 898 and 36 Stat. 263.)

Appellant is said to have violated Sec. 3 of this act in that she is an alien and has been found practicing prostitution after her entry into the United States. Sec. 3 provides inter alia:

"Any alien who shall be found * * * practicing prostitution after such alien shall have entered the United States * * * shall be deemed to be

unlawfully within the United States, and shall be deported in the manner provided by sections twenty and twenty-one of this Act."

Secs. 20 and 21 provide to some extent for the procedure in these cases. Under Sec. 20 the alien can be taken into custody *"upon the warrant of the Secretary of Labor and deported to the country whence he came."* Sec. 21 refers back to Sec. 20.

Further procedure in these cases is provided for by Rule 22 of "Immigration Rules" established by the Commissioner General of Immigration under Sec. 22 of "The Immigration Act" above mentioned. It is submitted that under these laws and rules in order to constitute due process, there must be

A. A HEARING.

And in order to have a hearing there must be—

(a) A valid warrant of arrest.
(b) Arrest of the alien under that warrant.
(c) A bringing of that alien before the administrative officer named in the warrant.
(d) Evidence produced and offered before that administrative officer.
(e) A finding or decision by such administrative officer actually made and based upon that evidence.

(a) In Appellant's case there was no warrant of arrest until some time at or after October 17, 1913. The only warrant of arrest which appears on the record bears that date, and the record is silent as to

the date of its arrival at Honolulu, and as to the carrying out of its commands. (See pp. 26-27 Trans.) Prior to that date, on October 2, 1913, Appellant was taken into custody or in some way brought before Examining Inspector Harry B. Brown, was sworn and her testimony taken, and this procedure was repeated on October 7, 1913. (See pp. 29-30 Trans.) All of this was done upon what is called a "Telegraphic warrant of arrest" which is dated September 29, 1913 and addressed to "Immigration Service Honolulu," and requests the arrest of "TOKU TAKI," among other aliens alleged to have been found practicing prostitution after entry. (See pp. 30-31 Trans.) *This cablegram is not a warrant of arrest.* It does not bear the ear marks of a warrant. It is defective in the following particulars essential to a warrant:

1. It is not directed to or addressed to any "person or persons therein described" within subd. 4 (a) Rule 22 Immigration Rules. It is simply addressed to "Immigration Service Honolulu."

It should have been addressed to a definitely named person, an official in the Immigration Service before whom Appellant could have been brought for hearing to be a valid warrant and to comply with the requirements of Rule 22 subd. 4 (a), which provides "upon receipt of a warrant of arrest the alien shall be taken before the person or persons therein

described and granted a hearing to enable him to show cause," etc. Subd. 2 of Rule 22 provides for telegraphic application for a warrant of arrest but not for a telegraphic warrant of arrest. Nowhere in the law or rules is there provision made for a telegraphic warrant of arrest. If such a warrant is proper it should, to be valid, contain the essentials of a warrant as shown by the warrant on pp. 26-27 Trans.

"It must be directed to the proper officer, either by name, or by a description of the office which he holds." Voorhees on the Law of Arrest, Sec. 45, p. 42, and cases cited.

(2) It does not state that the necessary complaint or application supported by evidence has been made as required by subd. 2 of rule 22 of Immigration Rules.

It does not appear from this cablegram that it is issued on any evidence or oath or affidavits or anything subd. 2 of Rule 22 provides:—

"The application must state facts bringing the alien within one or more of the classes subject to deportation after entry. The proof of these facts should be the best that can be obtained * * * telegraphic application may be resorted to only in case of necessity and must state (1) that the usual written application has been forwarded by mail and (2) the substance of the facts and proof therein contained."

From the record and the cablegram of September 29, 1913, it does not even appear that any application had been made or that any facts sufficient to

issue a warrant upon were in the possession of the Immigration Authorities either at Honolulu or at Washington. In fact, the only inference from the record is that no facts about Appellant were obtained by the Immigration Authorities until the alleged hearing on October 2, 1913.

See *Jouras v. Allen,* 222 Fed. 756.

(3) It states only conclusions and not facts which are sufficient to bring Appellant within the excluded classes, and from an inspection of said cablegram Appellant could not know the charge against her so as to prepare her defence.

To be a valid warrant the cablegram of September 29, 1913, should state facts sufficient to charge a violation of the Immigration act, and not only the base legal conclusion "Alien found practicing prostitution after entry." This conclusion is stated in code, and from an inspection of it by an ordinary person, would convey no intelligence at all. Note Rule 22 Immigration Rules, Subd. 4 (b), which provides for an inspection of the warrant and evidence on which it is based by the alien after arrest during the course of the hearing. See Voorhees on the Law of Arrest, Sec. 45, p. 41. *U. S. v. Libray,* 178 Fed. 144, 185 Fed. 401, 107 C. C. A. 483.

The alleged warrant (cablegram) does not even specify the section of the Act of Congress or the Act of Congress with the violation of which the alien is charged. Under this alleged process upon inspection thereof, an alien could not prepare a defense.

(4) It is not a warrant for Appellant, since it does not name Appellant nor sufficiently describe her. The cablegram of September 29, 1913, does not name Appellant, whose name is "TOKU SAKAI," but calls for the arrest of "TOKU TAKI," nor does it describe Appellant, so that she could be identified. This is essential to its validity as a warrant.

Ex. p. Pouliot, 196 Fed. 437.

U. S. v. Amor, 68 Fed. 885, 16 C. C. A. 60.

"It must correctly name the defendant, or so accurately describe him that from the description he may be identified."

Voorhees on the Law of Arrest, Sec. 45, p. 42, and cases.

"A warrant will not justify the arrest of one not named therein, by reason of the fact that the name used was supposed to be his." Voorhees on the Law of Arrest, Sec. 90, p. 83, citing *West v. Cabell,* 153 U. S. 78, 14 Sup. Ct. 752, 28 L. rd. 643.

(b) There was no arrest of Appellant TOKU SAKAI, since she was not named in the cablegram of September 29, 1913, and it does not appear from the record that Appellant was arrested under this cablegram, there being no return. This follows from the above, and Appellant's detention on October 2 and 7, 1913, was therefore false imprisonment.

(c) Appellant was not brought before the Administrative Officer named in the cablegram, since no person is named in the cablegram, but only "Immigration Service Honolulu." Appellant was brought

before Harry B. Brown, on October 2 and 7 (see pp. 29-30 Trans.), and he is not named in the cablegram. (See pp. 30-31 Trans.) This is contrary to Rule 22 of Immigration Rules, Subd. 4 (a).

(d) No evidence was offered before any officer named in the cablegram since no person was named therein. This follows from the above since the evidence was taken before Harry B. Brown.

(e) Harry B. Brown, the person who heard the evidence at the alleged hearings of October 2, 1913, and October 7, 1913, never made any decision or finding to the effect that Appellant appeared to be from the evidence within the excluded classes and subject to deportation. The only thing in the record which even approaches a decision or finding is to be found on pp. 24-25 of Trans., entitled, "Remarks by examining Inspector." Who made these remarks does not appear. It is elementary that to constitute due process in an administrative hearing of the sort contemplated in deportation proceedings, the person, Inspector or whatever he may be who heard the evidence must make his finding or decision therefrom. Someone else cannot do it for him. For aught that appears from the record, any one of the Immigration Inspectors at the Port of Honolulu, may have made the remarks on March 16, 1914, contained on pp. 24-25 Trans. See *U. S. v. Williams,* 185 Fed. 589, 599; *U. S. v. Wong Chung,* 92 Fed. 141, 144; *In re Kornmehl,* 87 Fed. 314, 315; Ex p. O w Guen, 148 Fed. 926; *In re Di Simone,* 108 Fed. 942; *U. S. v. Gin Fung,* 100 Fed. 389, 40 C. C. A. 439.

Thus we contend that it has been established that up to October 17, 1913, there was no hearing at all in the case of Appellant TOKU SAKAI. On October 17, 1913, a cablegram was received similar to the cablegram of September 29, 1913. (See p. 28 Trans.) Except for the fact that it correctly names Appellant, the same objections may be urged against it as are above urged against the cablegram of September 29, 1913, and it cannot be said to be a warrant of arrest at all. From the record it does not appear that Appellant was ever arrested under it. On pp. 26-27 of Trans. we have the warrant of arrest for Appellant. It is dated October 17, 1913, but the record does not show when it arrived at Honolulu or that Appellant was ever arrested under it or given a hearing under it. The record shows a letter to Attorney Sheldon dated December 18, 1913 (see p. 26 Trans.), and on December 22, 1913, Attorney Sheldon appears, but before whom? The record does not show, nor does it show that Appellant was brought before anyone after October 7, 1913. (See p. 25 Trans.) No evidence was introduced and nothing was done in the way of a hearing after October 7, 1913. On March 12, 1914 (see p. 25 Trans.), we have the practical withdrawal of Attorney Sheldon from the case. The evidence taken on October 2 and 7, 1913, was never introduced before Harry B. Brown, at any time after it was taken either before or after the warrant of arrest dated October 17, 1913. Surely the mere opportunity given Attorney Sheldon

to introduce evidence or file a brief does not constitute a hearing. On p. 24 Trans., we have Mr. Halsey's letter stating that Appellant was given a hearing as directed in warrant of arrest No. 53678/465, which is the warrant on p. 26 Trans., dated October 17, 1913. This is a mistake as we have shown, because the only hearings were had on October 2 and 7, 1913, based on the cablegram of September 29, 1913, the alleged "Telegraphic warrant of Arrest attached as Exhibit A." Thus it is submitted that Appellant had no hearing at all so far as the record discloses, i. e., the record fails to disclose that Appellant had due process of law.

We pass now to the second proposition.

2. *Appellant was given only the semblance of a hearing before the Immigration Authorities at Honolulu and thus denied due process of law.*

Admitting for the purpose of argument that Appellant had a hearing, it is contended that this hearing did not amount to due process of law, and was only the semblance of a hearing because—

A. Appellant was not advised of her right to be represented by counsel as required by the Constitution of the United States, the law and the Immigration Rules.

B. Appellant was not allowed to inspect the warrant of arrest or the evidence on which it was based during the course of her hearing.

C. Appellant was not informed of her rights nor

of the charge against her, and was compelled to be a witness against herself.

D. All of the evidence against Appellant was obtained from herself in violation of her legal and constitutional rights, and therefore could not be used against her to base a finding or decision against her on, or an order of deportation on.

E. There is not sufficient evidence against Appellant to base a decision or finding against her on, or an order of deportation against her on.

F. That the alleged finding and order or warrant of deportation against Appellant is not supported by any evidence or sufficient evidence.

We will consider the contentions in order.

A. All of the grounds submitted under 1 supra why there was no hearing at all may be here urged to sustain the proposition that there was only the semblance of a hearing in this case. Subd. 4 (b) of Rule 22 of Immigration Rules provides for counsel for the alien. It attempts to vest a discretion in the officer conducting the hearing and provides:—"and at such stage thereof as the officer before whom the hearing is held shall deem proper, he shall be apprised that he may thereafter be represented by counsel and shall be required then and there to state whether he desires counsel, or waives the same, and his reply shall be entered on the record." It is submitted that the right to counsel is an absolute one and no discretion such as is attempted to be vested by this rule can be constitutionally vested in the ad-

ministrative officer. The discretion was abused in this case, as shown on the record. Appellant was not advised as to her right to counsel on October 2, 1913, at any time during that alleged hearing. It was not until October 7, 1913, five days later, when she was again brought before Harry B. Brown, that she was asked, "Do you want a lawyer?" and she answered "Yes." (See pp. 29-30 Trans.) After her hearing was all over for five days, then she was asked about her constitutional right, and her right under the rule to counsel, after she had been sworn and practically compelled to be a witness against herself, and give answers tending to show her guilty of an offense against the laws of the United States relative to adultery and fornication in force in the Territory of Hawaii. She should have been advised at the outset of or at least at some time during the hearing on October 2, 1913, of her right to counsel.

"A denial of permission to him to see the warrant and to have counsel until within five minutes of the close of the hearing, would be a clear abuse of discretion, and would render the provisions of the rule as administered 'inconsistent with law' and void. Although a law or rule be fair and just in appearance, yet, if it is applied and administered by public authority with an evil eye and an oppressive hand, so as to deprive a person of his fundamental rights, it cannot be sustained."

Whitfield v. Hanges, 222 Fed. 745, 751, and cases cited. "One of the objects of this rule was to give not to deprive, the alien of the benefit of counsel. The time when an alien, who is ordinarily ignorant of

the law, of legal procedure and of his rights, may derive the most benefit of counsel is when he is arrested and his hearing begins. It would have been no abuse of discretion of the inspector to have permitted the Appellees to have counsel to advise them immediately upon their arrest, and to have permitted them and their counsel to inspect the warrant of arrest, to be present and take part in the proceedings at and after the first stage of the examination and hearing of the aliens. Such a course would have been in accord with the fundamental principles of English and American jurisprudence consistent with law, and it should have been pursued."

Whitfield v. Hanges, 222 Fed. 745, 751.

See also

Low Wah Suey v. Backus, 225 N. S. 460, 325 Ct. 734, 56 L. ed. 1165.

Roux v. Comm., etc., 203 Fed. 413, 121 C. C. A. 523.

U. S. v. Wong, 94 Fed. 832.

B & C. Nowhere in the record does it appear that Appellant nor Attorney Sheldon was allowed to inspect any warrant of arrest or any evidence or informed of the charge against Appellant. The cables are in code and an inspection would do no good without an explanation by someone who knew the code. On October 2, 1913, Appellant was sworn and required to answer questions with no explanation of what she was to face or the charge against her, if any, or the evidence against her. (See pp. 29-30

Trans.) These things should have been done, and their omission constitutes an abuse of discretion and shows the hearing to have been unfair and only the semblance of a hearing. See Rule 22, Subd. 4 (b), of Immigration Rules requiring these things to be done.

Also

Whitfield v. Hanges, 222 Fed. 745, 751.
Ex. p. Petloos, 212 Fed. 275, 214 Fed. 978.
U. S. v. Wong, 94 Fed. 832.
Jouras v. Allen, 222 Fed. 756.

An ignorant alien, a Japanese woman, should have been given opportunity to seek independent advice or the advice of counsel. To be brought up before an official, a stenographer and an interpreter, sworn, and asked questions amounts to compulsion, or at least to unfairness, especially when the subject is an ignorant alien, and this is done with no explanation. Appellant was not even told that she need not incriminate herself, or that her answers could be used to deport her from the country. This procedure could have but one effect upon her untrained mind, i. e., to produce the belief that she must answer the questions, and she did.

See *Jouras v. Allen,* 222 Fed. 756.
Whitfield v. Hanges, 222 Fed. 745.

D. The only evidence against Appellant as shown by this record was obtained on October 2 and 7, 1913, at the two alleged hearings on those dates. (See pp. 29-30 Trans.) This evidence consists entirely of Ap-

pellant's own answers to questions put to her. Such evidence obtained from Appellant in violation of her rights could not be used against her at any subsequent hearing or to base a decision, finding or order against her upon as was attempted. (See pp. 24-25 Trans.)

See *U. S. v. Wong Quong Wong,* 94 Fed. 832.
35 Cyc. 1263.

Appellant had been for over eleven years a resident of the United States, in the Territory of Hawaii, and to be taken into custory before Harry B. Brown, upon the cablegram of September 29, 1913, and questioned was clearly in violation of Appellant's rights, under the Constitution of the United States against unreasonable searches and seizures, and not to be deprived of her liberty without due process of law. (See pp. 5-15-44-30-31 Trans.) The cablegram of September 29, 1913, was not a warrant and the alleged hearings of October 2 and 7, 1913 (pp. 29-30 Trans), when Appellant was questioned and gave all of the evidence against herself, therefore constituted a false imprisonment of Appellant and all of this was ununecessary so far as the record speaks. No results so obtained should be allowed to be used against Appellant in any way.

Whitfield v. Hanges, 222 Fed. 745.
Jouras v. Allen, 222 Fed. 756.
35 Cyc. 1263.
U. S. v. Wong Quong Wong, 94 Fed. 832.

E. & F. The evidence in toto contained on pp.

29-30 Trans. is not sufficient to warrant a deportation of Appellant upon as a matter of law. Appellant alleges in her petition for a writ of habeas corpus that she has been for over eleven years a resident of the Territory of Hawaii, and this is not denied by the returns to the writ of habeas corpus. (See pp. 5 and 15 Trans.) Appellant testifies to this effect at p. 29 Trans. where she says she came to Hawaii "Mejii 37," which means about eleven years before October 2, 1913. This is recognized by the learned lower court's decision. (See p. 44 Trans.) Appellant is a married woman and separated from her husband (p. 29 Trans). The evidence is that about five years ago Appellant practiced prostitution for the period of about one year. (See pp. 29-30 Trans.) This mere temporary practice of prostitution while separated from her husband done and over with by her four or five years before the deportation proceedings on October 2, 1913, were commenced against her do not justify her deportation, as a matter of law.

Sprung v. Morton, 182 Fed. 330.

The alleged finding or decision contained on pp. 24-25 Trans. reads: "From the testimony of this woman it appears that she is an alien, and that she has been practicing prostitution for a livelihood." Even admitting that there is evidence of her practicing prostitution for the purposes of argument, yet, there is absolutely no evidence on the record that she did so for a livelihood or for any other purpose or

end or aim. She may have done it for pleasure, or because she was compelled to by others, or for almost any reason. This finding shows the bias and prejudice of the authorities in this case.

The evidence is not sufficient to bring Appellant within the class excluded by the act, i. e., aliens found practicing prostitution after entry. Note the evidence.

Q. Have you been practicing prostitution?
A. Yes.
Q. How long?
A. About one year, and I did before that time.
Q. When did you first start in the occupation?
A. About five years ago.

(See pp. 29-30 Trans.) There is no evidence that within four or five years of the date the above evidence was taken, which was October 2, 1913, Appellant had practiced prostitution. Appellant had been a resident of the Territory of Hawaii, at that time, for about eleven years. The evidence does not show she was found or ascertained to be practicing prostitution within three years after her entry or on or about October 2, 1913. Secs. 20 and 21 of "The Immigration Act" provide for deportation of aliens "within the period of three years after landing or entry into the United States." Surely Appellant is not within the intent and meaning of the provisions of this act, and subject to deportation. She entered not three but about eleven years before October 2, 1913, and she had not practiced prostitution for four

or five years prior to the time of her attempted deportation. Thus as a matter of law, from the undisputed evidence she does not come within the spirit and letter of the law, and cannot be deported.

Again, it is submitted that there is no evidence to show that she comes within the act. As a matter of law her answer "Yes" to the question "Have you been practicing prostitution?" is not sufficient to put Appellant in the class subject to deportation. It merely called for and obtained a conclusion from Appellant and might have meant many things. It should have been shown *When, where, and under what circumstances* Appellant practiced prostitution, that Appellant had sexual intercourse with men, and took money and thereby earned her living. With such evidence only could Appellant be deported.

See

U. S. v. Williams, 200 Fed. 538, 118 C. C. A. 632.

U. S. v. Williams, 189 Fed. 915, 206 Fed. 915, 206 Fed. 460, 124 C. C. A. 366.

U. S. v. Williams, 175 Fed. 274.

Ang Eng Chong v. Collector of Customs, 23 Philippine 614.

U. S. v. Whl., 211 Fed. 628.

U. S. v. International Mercantile Mar. Co., 194 Fed. 408, 114 C. C. A. 370.

U. S. v. Williams, 190 Fed. 897.

Ex. p. Watchorn, 160 Fed. 1014.

U. S. v. Gin F. Ung, 100 Fed. 389, 40 C. C. A. 439.

In conclusion it is now respectfully submitted that Appellant was denied due process of law (1) in that she was given no hearing, (2) and if given a hearing it was not a legal hearing, but only the semblance of a hearing. Appellant should therefore be discharged under her writ of habeas corpus.

Respectfully submitted,

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Dated at Honolulu this

20th day of July, A. D. 1916.